

United States Senate
WASHINGTON, DC 20510

October 21, 2011

The Honorable Harry Reid
Senate Majority Leader
522 Hart Senate Office Building
Washington, D.C. 20510

Dear Majority Leader Reid:

We write as Members of the Senate Judiciary Committee and the Senate Select Committee on Intelligence to express our grave concern with Subtitle D (titled "Detainee Matters") of Title X of S.1253, the National Defense Authorization Act for Fiscal Year 2012. We support the majority of the provisions in this bill, which further national security and are of great importance to the needs of the men and women in our Armed Forces, but we cannot support the controversial detention policy provisions in S.1253.

The Executive Branch must have the flexibility to consider various options for handling terrorism cases, including the ability to prosecute terrorists for violations of U.S. law in Federal criminal courts. Yet, taken together, Sections 1031 and 1032 of Subtitle D of S.1253 are unprecedented and require more rigorous scrutiny by Congress. Section 1031 needs to be reviewed to consider whether it is consistent with the September 18, 2001 Authorization for Use of Military Force (AUMF), the law of war, and the Constitution, especially because it would authorize the indefinite detention of American citizens without charge or trial.

Section 1032 would require that certain terrorism suspects be held in the custody of the Armed Forces, which could disrupt vital counterterrorism operations. For example, if these controversial provisions are enacted, the FBI may have to hand over a terrorism suspect captured in the U.S. – like Najibullah Zazi – to the military in the middle of an interrogation, even if the individual is providing useful intelligence to the FBI about an unfolding terrorist plot. In addition, under these sections, a suspected terrorist captured abroad – such as Ahmed Warsame – may have to be kept in military custody, even if potential charges against the suspect are available only in Federal criminal courts and not military commissions. In sum, mandatory military custody is unwise and will harm our national security.

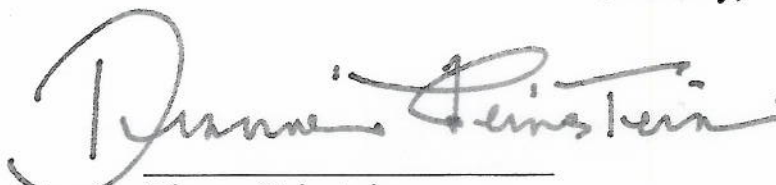
Recently, the Administration has made clear its opposition to requiring military custody for terrorism suspects by sharing the attached position paper with our offices. **We concur with the Administration's view that mandatory military custody is "undue and dangerous," and that these provisions would "severely and recklessly undermine" our Nation's counterterrorism efforts.**

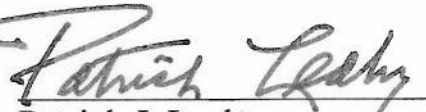
On Section 1033, we are concerned about the potential for recidivism of Guantanamo detainees and understand that the Administration has put in place a more stringent review process for all Guantanamo detainees, which must be satisfied before a detainee may be considered for transfer. Yet, for the past two years, Congress has made it virtually impossible for anyone to be transferred out of Guantanamo – even for prosecution in U.S. Federal courts or in other countries. We believe it unwise to make permanent in law the onerous certification requirements in Section 1033. Professionals in the Intelligence Community and law enforcement need the flexibility to use all tools to effectively interrogate, incarcerate, and bring terrorists to justice.


We wholeheartedly support providing needed resources to our Armed Forces. However, we do not support provisions that would undermine our Nation's counterterrorism efforts. Given these significant concerns over the legislation, we request that you work to ensure that the "Detainee Matters" that are part of Subtitle D are removed.


Thank you very much for your attention to this matter.

Sincerely,


Dianne Feinstein

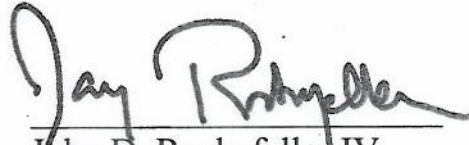

Patrick J. Leahy


Mark Udall

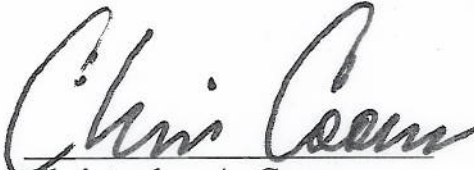

Richard J. Durbin



Ron Wyden



John D. Rockefeller IV



Christopher A. Coons



Al Franken



Barbara A. Mikulski



Bill Nelson



Mark R. Warner



Kent Conrad



Sheldon Whitehouse

cc: The Honorable Carl Levin, Chairman, Senate Armed Services Committee

Enclosure

**The SASC National Defense Authorization Act:
Undue and Dangerous Requirement of Mandatory Military Custody**

The SASC-reported version of the NDAA includes a provision that would mandate military detention of any non-citizen who is a member or part of al Qaeda or an affiliated entity and has planned or carried out an attack or attempted attack against the United States or its coalition partners. Only the Secretary of Defense, in consultation with the Secretary of State and Director of National Intelligence, could waive this requirement—and only upon a written certification to Congress that a waiver is in the national security interest of the United States.

This requirement unduly constrains the President's authority to investigate and stop terrorist attacks, and will ultimately harm national security.

- Military custody of captured terrorists makes sense in some cases, and the President already has authority under the 2001 Authorization for Use of Military Force (AUMF) to authorize the military to capture and detain individuals who are part of al Qaeda, the Taliban, and associated forces. But even if a tool might be valuable in some cases, requiring the use of that tool is bad policy. It reduces our options for investigating and effectively responding to terrorist threats, advertises to our enemy exactly how we will respond to each new capture, and creates major operational hurdles.
- Every single suspected terrorist captured on American soil—before and after the September 11th attacks—has first been taken into custody by law enforcement, not the United States military. There have been only two cases in recent history in which suspected terrorists were subsequently transferred to military custody, and both of these cases spawned extensive litigation and raised major statutory and constitutional questions concerning the legality of the government's actions.
- Civilian law enforcement agents—not the military—would likely be the first responders in the event of a domestic terrorist attack or attempted attack on U.S. soil. Law enforcement officials focus first on questioning designed to obtain information about on-going attacks or plots, the location and nature of potential weapons, and associates of the captured individual who may still be at large. Under this bill, agents would be required to stop such questioning if the individual is determined to be a member of al Qaeda or an affiliated group and turn the individual over to military custody. This requirement would apply even if the individual was cooperating with law enforcement and providing critical and time-sensitive intelligence.
- To be sure, the bill contains a waiver provision. But the Secretaries of Defense and State, and the Director of National Intelligence are not those primarily responsible for investigating and responding to domestic terrorism; this responsibility falls primarily to the FBI, along with components of the Department of Homeland Security. In many circumstances, it may not be possible to arrange briefings, secure the necessary concurrences, and execute a waiver in real-time, as investigations are unfolding. Thus, the FBI would be required to halt critical intelligence-gathering

operations upon a determination that a suspected terrorist is part of al Qaeda and transfer the individual to military custody.

- There are times when federal law enforcement authorities will keep a suspected terrorist under full-time surveillance, but not arrest him, in order to continue observations that will yield more information about associates and operational plans. In other instances, federal law enforcement authorities may target a suspected terrorist in an undercover operation in order to collect intelligence and build a criminal case. Under this bill, absent a waiver from the Secretary of Defense, the U.S. military could be obliged to take custody of these individuals as soon as they are determined to be part of al Qaeda, thereby disrupting ongoing law enforcement investigations that otherwise could provide intelligence vital to national security and result in reliable jail time for the suspect.
- Under this provision, approximately one-third of the terrorists charged in federal court in 2010 would have initially been subject to mandatory military detention, absent a waiver from the Secretary of Defense. In some cases, the legislation would actually require the government to split up co-defendants—with American defendants in federal law enforcement custody and their non-citizen co-conspirators transferred to military custody absent a waiver.
- The bill threatens our ability to ensure that terrorist suspects are incarcerated for the long-term. In some cases, we may initially believe that an individual is associated with al-Qaeda but later discover that he is a “lone wolf.” Placing such an individual in military custody could jeopardize what would have otherwise been a viable prosecution option.
- Some foreign governments, including many of our closest allies, are unwilling to transfer terrorism suspects to the United States or even provide evidence about suspected terrorists if they believe they will end up in military custody. If enacted into law, the bill will likely undermine international law enforcement cooperation, and could even result in dangerous terrorists being set free.
- For decades, presidents of both political parties have leveraged the strength and flexibility of our federal criminal justice system to incarcerate dangerous terrorists and gather critical intelligence. We have effectively used the criminal justice system to obtain information about plots against our homeland, the location of al Qaeda safe houses and training camps, the location of senior al Qaeda figures, and telephone addresses and e-mail addresses used by al Qaeda.
- The legislation is likely to be challenged on constitutional grounds. Under certain circumstances, the constitutionality of the military detention of an alien, especially one with substantial ties to the United States, could be unsettled and highly contentious. Moreover, the absence of a statutory provision for judicial review may lead to additional constitutional challenges.

The flexibility to choose from the beginning, based on the evidence and the facts and circumstances of each case, which system of detention and trial best serves our national security interests is not a luxury, but a necessity. By restricting that flexibility, the bill will severely and recklessly undermine our ability to incapacitate dangerous individuals and to protect the American people.